

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-2077

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT : NEW YORK

SEP 27 1976

VICTOR PANICA,

PETITIONER-APPELLANT,

-against-

Docket No. 76-2077

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

PETITIONER-APPELLANTS' PRO SE
BRIEF ON APPEAL

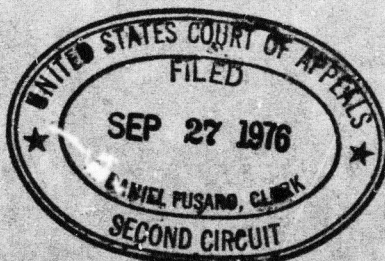
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P/s

DATED: This 23rd day of September, 1976.

Respectfully submitted,

Victor Panica

Victor Panica
Petitioner-Appellant, pro se
PO Box PMB #74678
Atlanta, Georgia 30315



PAGINATION AS IN ORIGINAL COPY

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PETITIONER-APPELLANT'S PRO-SE
BRIEF ON APPEAL

QUESTIONS PRESENTED FOR REVIEW

1. Whether once a petitioner comes forward with affidavits, in a 28 USC §2255 proceeding, that support his allegations of prosecutorial misconduct in exerting coercive influence over a co-defendant, via threats and promises, into not testifying in petitioner's behalf, the district court may deny relief without holding an evidentiary hearing and not violate the petitioner's basic right to due process of law as mandated by the Fifth Amendment?

2. Whether under the totality of circumstances advanced below it was a denial of due process of law to deny, without a

hearing, the petitioner's allegations that the lower court did not conduct an on-the-record inquiry as to the conflict of interest generated by counsel, from the same firm, representing petitioner and the co-defendant; especially when in petitioner's pre-trial motion for severance his attorney relied upon the ground that the co-defendant would offer testimony to exonerate the petitioner?

PRELIMINARY STATEMENT

The petitioner, Victor Panica, moved pro se on or about August 1, 1975, on Motion To Vacate Sentence pursuant to 28 USC §2255. The Government's response in opposition was submitted on February 10, 1976, and the petitioner traversed thereto on February 20, 1976. The lower court denies the petitioner's motion on March 17, 1976.

Timely Notice Of Appeal was duly submitted along with filing fee thereto. Docketing fee was sent to this Court on or about April 13, 1976. The certified record on appeal was docketed on or about June 6, 1976. Therefore, the present appeal is now properly before this Court.

STATEMENT OF FACTS

The petitioner, Victor Panica, was indicted on March 17, 1972, along with ~~Th~~others who were charged as co-defendants, viz., Albert Pierro, Nicholas Christophe, and Frank DeSimone. The indictment, No. 72 Cr. 313, contained two counts alleging a violation of the Controlled Substance Act of 1970. Panica, the petitioner herein,

was convicted on May 2, 1972, on both counts; DeSimone was acquitted by the trial court (Gagliardi, J.) at the end of the Government's case. Pierro and Christophe were thereafter tried together without a jury and both were found guilty (Pierro had previously entered a plea of guilty but was allowed to withdraw his plea). The petitioner was subsequently sentenced to a jail term of 20 years, and this Court affirmed on direct appeal (United States V. Christophe, 470 F.2d 865, cert. den. 411 U.S. 964 (1972)).

On March 25, 1974, the petitioner filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the basis of "newly discovered evidence", he also sought to vacate his conviction via 28 USC §2255. Said motion was submitted by his attorney, Stanley M. Meyer. Two supporting affidavits were appended to the motion. One was an unsworn statement of a federal employee from the then Federal House of Detention at West Street. The latter stated that while Christophe was lodged at the House of Detention, the employee came upon Christophe crying in his cell and inquired as to what was wrong. Christophe replied that "if he had testified at the trial of Panica, Panica would not be in jail today." And further, that "the United States Attorney had told him (Christophe) that if he took the witness stand to clear Panica, he, the United States Attorney, would prosecute him for bank robberies."

The second affidavit was from petitioner's convicted co-defendant, Pierro, and stated that prior to either of the two

trials he overheard conversations between the petitioner and Christophe in which Christophe told the petitioner that "when the proper time arrived he would take the witness stand and exonerate (him) from any guilt." Pierro also stated, in his sworn affidavit, that Christophe had personally told him, "outside of Panica's hearing range that he (Christophe) would do anything Mr. Higgins (The Assistant United States Attorney then in charge of the case) told him so long as Mr. Higgins promised him that he would be allowed to visit his sick daughter." Pierro further swore that he remained silent on the subject until this time because he feared reprisals from the United States Attorney's office.

On November 25, 1974, the lower court denied the motions in a memorandum opinion holding that the affidavits by the petitioner were not sufficient to warrant relief because they did not qualify as proper evidentiary material to support either motion in that the affidavits merely contained hearsay allegations which would not be admissible at a hearing, citing as authority D'Ercole V. United States, 361 F.2d 211 (2nd Cir. 1966). On May 14, 1975, this Court affirmed from the bench without a written opinion.

The Instant Appeal And The Second Motion.

On August 1, 1976 the petitioner submitted a second petition under 28USC §2255 to which he appended three additional affidavits. The affidavits were from Stanley M. Meyer, the attorney who represented the petitioner on the first motion, and Meyer's

investigator, Herman Race. These two affidavits identify the employee at the Federal House of Detention as Henry McGowan, and state that Mr. McGowan was reluctant to give a signed statement because of his fear of Government reprisal. The third affidavit was from a Lieutenant Carter, the lieutenant of guards at the Federal House of Detention, which reflected that Christophe told him that an Assistant United States Attorney was threatening him with prosecution for a number of bank robberies. And that "Mr. Christophe also stated that he was being pressured by Mr. Hicks (sic) (i.e., AUSA, Walter Higgins) to testify against a Mr. Gino (Gino Gallina, Esq., represented the petitioner at trial, and was then under Grand Jury investigation)..."

On March 17, 1976, the lower court denied relief. In so doing it adhered to its former opinion. (See appendix, p.9).

ARGUMENT

POINT I

THE PETITIONER HAS SUBMITTED SUFFICIENT EVIDENCE, VIA INDEPENDENT AFFIDAVITS, THAT CLEARLY SHOW PROSECUTORIAL MISCONDUCT IN COERCING A WITNESS INTO NOT TESTIFYING FOR THE PETITIONER AND THUS DENY HIM DUE PROCESS OF LAW

The petitioner is not unmindful of this Court's position in similar situations whose central theme evolves around affidavits, the cases are legion. Notwithstanding, the petitioner is hopeful that instead of this Court relying on its own plethora of case law to deny the petitioner relief that instead it rest its decision on that instrument that forms the very foundation of this Court's existence and power--the Constitution of the United States.

"I take it to be a clear position that if a legislative act impugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislator and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not subordinate, but a coordinate branch of the government." (Vanhorne's Lesse V. Dorrance, 2 Dallas 310; Fords V. Tulip Drive, 9 N.J. 1906; and Mikulick V. Orchard Terrace, 60 Lin. 423)

If, as noted above, legislative (and Congressional) acts must fall in the face of constitutional prerogative, it is, a fortiori, with prosecutorial action that trespasses due process rights.

For as the Supreme Court so cogently articulated

"(t)he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (United States v. Berger, 295 U.S. 78, 85 (1935))

In the case at bar the petitioner has submitted affidavits that raise serious constitutional questions as to the integrity of the proceedings at the trial level, i.e., the Asst. U.S. Atty. is accused of coercing a witness for the petitioner into not testifying for the petitioner, through a process of intimidation based on threats and promises. This issue is not resolved by the trial court's files and records, or by the district judge's personal knowledge or recollection, nor are the allegations in the motion and affidavits vague, conclusory or palpably incredible. (See e.g., Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972)). Notwithstanding, the court below denied relief without conducting an evidentiary hearing into the merits of the petition, deeming the affidavits to contain "hearsay allegations." Thus the petitioner has twice been denied a corrective judicial process to his claim of violation of his constitutional guarantees. (But see and cf., Case v. Nebraska, 381 U.S. ___, 14 L.Ed.2d 422, 85 S.Ct. 1486 (1965) and Young v. Ragen, 337 U.S. 235, 69 S.Ct. 1073, 93 L. Ed. 1333 (1949)).

The fact that this is a second motion relitigating the same issue as the first motion is irrelevant. The Supreme Court, in Sanders V. United States, 373 U.S. 1, 10 L.ED.2d 148, 83 S.Ct. 1068 (1963), discussed the effect of successive motions under 28 USC §2255 at length. There the petitioner's first motion was denied as purely conclusory and unsupported by factual assertions, and his second motion was denied because the assertions therein could have been made in the first motion. Reversing the judgment affirming the denial of the second motion, the Supreme Court ruled that §2255 was enacted to provide in the sentencing court a remedy exactly commensurate with that previously available to a prisoner via habeas corpus, and that the fifth paragraph of 28 USC §2255 cannot be read literally, and must be deemed the material equivalent of what is now 28 USC §2244(a). Consequently, the Court said, controlling weight may be given to a denial of a prior application for federal habeas corpus or §2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The Court added that the successive application need not be considered if it is an abuse of the remedy--which the Government must plead--and that the second motion should be denied without a hearing where it is conclusively shown, on the basis of the application, files, and records, to be without merit. Finally, the Court held

that the second petition was improperly denied because the first petition was not denied on the merits.

In the instant case the petitioner has twice sought a hearing in order to establish the legitimacy of his claim that the prosecutor was directly responsible for depriving him, the petitioner, of a valuable witness's testimony. Affidavits have been submitted that support the petitioner's allegations. The records and files of the trial court do not conclusively show that the petitioner is not entitled to a hearing. Rather, and in truth, the records and files reflect that a pretrial motion had been made stating that the petitioner intended to use a co-defendant (Christophe) as a witness, and subsequent affidavits support this claim. Thus, issues were presented to the lower court of a factual nature that could have only been resolved upon an evidentiary hearing. Twice hearings have been denied.

The petitioner respectfully submits that the issues involved herein fall outside the pale of the average controversy that is generally presented to this Court. As such, the Constitution of the United States should be the instrument utilized to gauge the validity of the petitioner's claims. Being a case of first impression resort to present controlling decisional law would be inconsistent with the requirements of due process. Therefore, a hearing should be ordered.

POINT II

IN LIGHT OF THE PETITIONER'S PRE-TRIAL
MOTION, THE LOWER COURT'S FAILURE TO
CONDUCT AN ON-THE-RECORD INQUIRY AS TO
CONFLICT OF INTEREST, COUPLED WITH THE
FAILURE TO GRANT AN EVIDENTIARY HEARING,
WAS A DENIAL OF DUE PROCESS OF LAW

Prior to trial petitioner's counsel submitted a motion for severance because he had been assured by his law partner that Co-defendant Christophe (who was represented by the petitioner's law partner), after severance, would be available as a witness for the petitioner. Shortly after the submission of the timely motion for severance Christophe was exposed to the pernicious tactics of the AUSA, Walter J. Higgins, which included but were not limited to threats of prosecution for bank robbery charges and promises of allowing him, Christophe, to visit his sick daughter if he would not testify on behalf of the petitioner.

The petitioner's entire defense depended upon the testimony of Christophe. Unhappily, the machinations of the prosecutor deprived the witness of his free choice to go forward and testify to the truth as well as generating a conflict of interest.

While the normal situation wherein a conflict of interest will arise generally emanates from a case where one attorney represents opposing interests the same injury can accrue from a setting where, as here, both attorneys were from the same law firm and both attorneys were privy to the happenings of their respective clients. This

is clearly evident by the affidavit in support of the motion submitted by the petitioner's trial attorney.

The petitioner respectfully submits that under the fact pattern delineated in his moving papers, and the present appeal, it was incumbent upon the trial court to determine whether or not a conflict of interest existed. And that its failure to do so is

"...a dangerous laxity on the part of the trial judge in the discharge of his duty to preserve the fundamental rights of an accused." (Glasser V. United States, 315 U.S. 60, 72 (1942))

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed with directions that a hearing be had as to the merits of the petitioner's motion.

Respectfully submitted,

Victor Panica

Victor Panica
Petitioner-Appellant, pro se
PO Box PMB #74678
Atlanta, Georgia 30315

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

VICTOR PANICA, after being duly by law sworn, deposes and says: That on this 23rd day of September, 1976, he submitted copies of the instant brief to the Parole Officer named below for the purpose of mailing same to the United States Attorney for the Southern District of New York, New York State. All of which should constitute sufficient proof of service.

Yours etc.,

Victor Panica #74678

Victor Panica

Sworn to before me this
23rd day of September 1976.



Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

SEP 23 1976

SECRET

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE GAGLIARDI

1-21-72

72 CRIM. 313

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	
NICHOLAS CHRISTOPHE	Walter J. Higgins, Jr. 6346
FRANK DeSIMONE	
VICTOR PANICA	
ALBERT PIERRO	For Defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISC.
J.S. 2 mailed ✓	Clerk	6/21/72	P. H. Humberg	5	
J.S. 3 mailed 2, 13, 4	Marshal	6/23/72	N. S. T. men	5	
XXXXXX Comp. #72-0335	Docket fee	6/21/72	J. Goldberg	5	
Title 21		6/23/72	N. S. T. men	5	
Sec. 812, 841(a)(1) 841(b)(1)(A)		6/28/72	J. M. LaRocca	5	
846. Possess with intent		6/30/72	N. S. T. men	5	
distribute heroin, I					
t. 2) conspiracy so to					
(ct. 1)					
two counts					

DATE	PROCEEDINGS
3-17-72	Filed indictment.
4-21-72	Nicholas Christophe) All defts enter pleas of not guilty. Frank De Simone) Bail as set in indictment 72 Cr. 138 Victor Panica) on each deft. to cover this indictment Albert Pierro) previous motion carried to this end. Trial date 4-21-72 Gagliardi, J.
4-21-72	Victor Panica Filed- Second information of offender.
4-21-72	Albert Pierro Filed- Second information of offender.
4-21-72	All defts. Suppression hearing begun.
4-21-72	Hearing continued.

BEST COPY AVAILABLE

72 CRIM. 31

DATE	PROCEEDINGS
4-26-72	Deft. Christophe- signed and executed waiver of trial by jury this date. Stip. on facts to be submitted. Sentence decision reserved. Deft. remanded (no bail) Deft. Pierro- withdraws his plea of not guilty and pleads guilty. Deft's application to be remanded. Granted. Pre-sentence investigation ordered. Sentence adjourned to 5-26-72 at 10:00 A.M.
	Jury trial begun before Gagliardi, J. as to defts. DE SIMONE and PANICA.
4-21-72	N. Christophe-Hearing on motion to suppress began
4-24-72	Christophe- Hearing continued.
4-25-72	Christophe-Hearing continued and concluded. -Decision reserved.
4-26-72	Christophe-Filed waiver of trial by Jury.
4-26-72	Jury trial begun before Gagliardi, J. as to defts. DE SIMONE and PANICA.
4-27-72	Trial continued.
4-28-72	Trial continued. Deft. De Simone motion for acquittal- Granted. Deft's bail to be exonerated in this indictment only. after deft. posts new bail fixed by the Magistrate. Deft. excused by the court. Trial continued as to deft. Panica only.
5-1-72	Trial continued.
5-1-72	Trial continued-Jury starts deliberations. As to deft. Panica. only
5-2-72	Jury trial-Continued and concluded-Jury finds deft guilty on cts 1 & 2. P. S. I. ordered.-Deft. remanded in lieu of bail fixed on indict. 72 Cr. 138.-Sentence 6-19-72 at 9:30 A.M. Gagliardi, J. as to deft. Panica only
5-12-72	VICTOR PANICA Filed memorandum-application for reduction of bail pending app's sentence is denied. Bail is cont'd as previously set in the amt. of \$400,000. GAGLIARDI, J. m/n
5-17-72	Albert Pierro-Motion to withdraw plea of not guilty-Decision reserved. Gagliardi, J.
5-23-72	Albert Pierro Filed- Affvt. of Walter J. Higgins, Jr. in opposition to deft. motion for an order permitting the withdrawal of plea of guilty to both cts.
5-23-72	Pierro Filed-Memorandum of law.

(over)

DATE	PROCEEDINGS
5-25-72	Albert Pierro- Deft's motion to withdraw plea of guilty-Granted. Waiver of trial by jury approved and filed. Non-jury trial begun before Gagliardi, J. and concluded. Court finds defendants Pierro and Christophe guilty on counts 1 and 2. Both defendants remanded. Bail revoked. Sentence adjourned to 6-19-72. Pre-sentence report ordered. Gagliardi, J.
5-25-72	Albert Pierro Filed- Waiver of trial by jury Gagliardi, J.
6-20-72	Victor Panica - Filed notice of record on appeal to U.S.C.A. from the Judgment and conviction Bty for deft Jay Goldberg.
6-20-72	2nd VICTOR PANICA - Filed Judgment (Atty present) 2nd Offender the deft duly represented by counsel, admits that he is the person previously convicted as charged on one separate Federal Narcotic Violation.... The deft is committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec. 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of SIX (6) YEARS, to commence upon expiration of confinement.... Gagliardi, J. Issued commitment and copies...
6-20-72	ALBERT PIERRO- Filed Judgment (Atty. present) 2nd Offender the deft duly represented by counsel, admits that he is the person previously convicted as charged on one separate Federal Narcotic Violation.. The deft is committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on each of counts 1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec. 841 of Ti. 21, U.S.C, deft is placed on Special Parole for a period of SIX (6) YEARS, to commence upon expiration of confinement.... GAGLIARDI, J.... Issued commitment and copies...
6-20-72	NICHOLAS CHRISTOPHE- Filed Judgment (Atty. present) the deft is committed to the custody of the Atty. Gen. for imprisonment for a period of SEVEN and ONE HALF (7 1/2) YEARS on each of cts. 1 and 2 to run concurrently with each other. Pursuant to the provisions of Sec. 841 of Ti. 21, U.S. Code, deft is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement.. GAGLIARDI, J.... Issued commitment and copies...
6-21-72	Filed notice of appeal to U.S.C.A. dated 6-20-72. re: Albert Pierro
6-30-72	Christophe- filed affirmation and motion for deft. to appeal in forma pauperis and for appointment of counsel
7-7-72	Memo. endorsed on back Motion granted. so ordered Gagliardi, J. (mailed notice) (see file)
6-21-72	Panica- Notice of appeal to U.S.C.A. - fee paid mailed notice.
6-28-72	Pierro- Filed notice of appeal to USCA- mailed notice.
6-23-72	Filed Transcript of record of proceedings, dated 4-26-72.
7-11-72	Filed Transcript of record of proceedings, dated 4-26-72.
7-11-72	Filed Transcript of record of proceedings, dated 4-21, 24, 25, 1972.
7-11-72	Filed Transcript of record of proceedings, dated May 1, 2, 1972.
6-28-72	CHRISTOPHE- Filed deft's notice of appeal. mailed copy.

DATE	PROCEEDINGS
7-12-72	Victor Panica-filed affvt. and order that this Court recommends to the Gen. of the U.S. that the deft be retained at the Fed. Det. Hdqrs. 427 West. St. N.Y. Gagliardi, J.
7-24-72	<i>Pierro filed Commitment & entered return, Deft. Delivered to the Fed. Detention Hdqrs. N.Y. 6-26-72</i>
7-24-72	<i>Christophe filed Commitment & entered return, Deft. Delivered to the Fed. Detention Hdqrs. N.Y. 6-26-72</i>
8-8-72	PANICA - Filed notice that proceedings has been transmitted to U.S.C.A. on 8-8-72
8-17-72	Panica- Filed Order by Judge Bauman, dated 8-17-72, pursuant to Rule 38 of the FRCP, that this Court recommends to the Atty. Gen. of the U.S. that the defendant be retained at the Federal Detention Headquarters, 427 West St. New York, N.Y., for a period of seven days to permit the said defendant to assist in the preparation of his appeal to the said Court of Appeals. (see file) (m/n)
8-28-72	<i>Disposal of Panica- Filed Transcript of record of proceedings, dated 4-27-72</i>
	<i>Filed Transcript of record of proceedings, dated 4-28-72</i>
	<i>Filed Transcript of record of proceedings, dated 5-2-72</i>
11-17-72	Panica-Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.
5-12-72	Pierro, Filed affdvt. and defts notice of motion for an order permitting deft withdraw his plea of guilty.
12-13-72	Filed Govt's memorandum of law in opposition to defendants' motions to suppress, etc.
2-26-73	Nicholas Christophe, Victor Panica and Albert Pierro- Filed Mandate from USCA with Opinion attached, that the judgments of the District Court are affirmed. Judgment entered 2-26-73 - Clerk. (m/n)
5-17-73	Pierro-Filed true copy of Judgment of the Supreme Court of the U.S. for petition of writ of certiorari, petition denied.
5-17-73	Panica- Filed true copy of Judgment of the Supreme Court of the U.S. for petition of writ of certiorari, petition denied.
5-31-73	Nicholas Christophe Filed affidavit and notice of motion pursuant to Rule 35, for reduction of sentence.
7-23-73	VICTOR PANICA. Filed Commitment & entered return, Deft. Delivered to the Detention Hdqrs NY

DATE	PROCEEDINGS
9-28-73	ALBERT PIERRO: Filed NOTICE OF MOTION and supporting AFFIDAVIT and letters for a reduction of sentence and such other relief the Court may deem just and proper. Received from: James M. LaRossa, attorney for the defendant [522 Fifth Avenue, New York, N.Y. 10036].
10-5-73	Victor Panica-Filed defts notice of motion for an order reducing the sentence with memo endorsed attached, ***Accordingly, the motion is denied. (see memo in file) So Ordered Gagliardi, J.
9-26-73	ALBERTO PIERRO: Filed MEMORANDUM by Judge Gagliardi on motion for reduction of sentence from the defendant. Having reconsidered all information relevant to sentencing, the Court concludes that the original sentence is correct. Motion denied. GAGLIARDI, J.
12-20-73	NICHOLAS CHRISTOPHE: Filed AMENDED JUDGMENT. Court amends its judgment of June 20, 1972 to the extent indicated. The defendant is committed to the custody of the Attorney General, or his authorized representative, for a period of imprisonment of FOUR (4) YEARS on each of counts 1 and 2, to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. The Court recommends that the defendant shall become eligible for parole at such time as the Board of Parole may determine, pursuant to Section 4208(a)(2) of Title 18, U.S. Code. GAGLIARDI, J.
3/25/74	Filed deft V. Panica- filed Notice of motion re: new trial.
5/2/74	Filed Govt's affdvt re; opposition to deft's motions for a new trial, etc.
5/2/74	Filed Govt's memo of law in support of affdvt in opposition.
10/15/74	Filed deft. Pierro's notice of motion and affdvt. re: return of property, amend sentence, ret: 10/22/74.
11/25/74	Filed OPINION # 41485-...The motion for a new trial is equally lacking in support, being based upon the same affdvts. For the reasons stated, Panica's motions are denied. Gagliardi, J. mailed notices.
12/9/74	Filed OPINION #41545-...deft. Albert Pierro's motion for reduction of sentence is denied. Gagliardi, J. mn
12/13/74	Filed Govt.'s affdvt. in response to defts motion for return of property, etc.
12/19/74	Filed copy of judgment (for deft. N. Christophe) and marshal's return, served by air-mailing 3 copies of this amended judgment to the U.S. Marshal at Providence, Rhode Island.
12/20/74	Filed deft. Victor Panica's notice of motion re: search for papers, etc.
12/19/74	N. Christophe - Filed Complaint: ... DSA delivered in ... Released on 12/19/74 on mandatory release.

DATE	PROCEEDINGS
-28-73	ALBERT PIERRO: Filed NOTICE OF MOTION and supporting AFFIDAVIT and letters for a reduction of sentence and such other relief the Court may deem just and proper. Received from: James M. LaRossa, attorney for the defendant [522 Fifth Avenue, New York, N.Y. 10036].
2-5-73	Victor Panica-Filed defts notice of motion for an order reducing the sentence with memo endorsed attached, ***Accordingly, the motion is denied. (see memo in file) So Ordered Gagliardi, J.
-26-73	ALBERTO PIERRO: Filed MEMORANDUM by Judge Gagliardi on motion for reduction of sentence from the defendant. Having reconsidered all information relevant to sentencing, the Court concludes that the original sentence is correct. Motion denied. GAGLIARDI, J.
2-20-73	NICHOLAS CHRISTOPHE: Filed AMENDED JUDGMENT. Court amends its judgment of June 20, 1972 to the extent indicated. The defendant is committed to the custody of the Attorney General, or his authorized representative, for a period of imprisonment of FOUR (4) YEARS on each of counts 1 and 2, to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. The Court recommends that the defendant shall become eligible for parole at such time as the Board of Parole may determine, pursuant to Section 4208(a)(2) of Title 18, U.S. Code. GAGLIARDI, J.
25/74	Filed deft V. Panica- filed Notice of motion re: new trial.
2/74	Filed Govt's affdvt re; opposition to deft's motions for a new trial, etc.
2/74	Filed Govt's memo of law in support of rcsdvt in opposition.
/15/74	Filed deft. Pierro's notice of motion and affdvt. re: return of property, amend sentence, ret: 10/22/74.
11/25/74	Filed OPINION # 41485-...The motion for a new trial is equally lacking in support, being based upon the same affdvts. For the reasons stated, Panica's motions are denied. Gagliardi, J. mailed notices.
2/9/74	Filed OPINION #41545-...deft. Albert Pierro's motion for reduction of sentence is denied. Gagliardi, J. mn
2/18/74	Filed Govt.'s affdvt. in response to defts. motion for return of property, etc.
2/19/74	Filed copy of judgment (for deft. N. Christophe) and marshal's return, served by air-mailing 3 copies of this amended judgment to the U.S. Marshal at Providence, Rhode Island.
2/20/74	Filed deft. Victor Panica's notice of motion re; search for papers, etc.

5890

75 CIV. 5897

BELL, TOMMIE L.

VS

UNITED STATES OF AMERICA

75-5898 Judge Gagliardi Victor Panica -vs- United States of America 75-5898

590

DATE	NR.	PROCEEDINGS
11-21-75	(1)	Filed motion to vacate sentence.
11-21-75	(2)	Filed Order that the petitioner is permitted to proceed in forma pauperis without prepayment of fees. Pierce, J.
11-21-75	(3)	Filed notice of referral of action to Judge Gagliardi.
02-10-76	4	Filed Affidvt of Thomas M. Fortuin for Respondent in opposition to motion of petitioner proceeding pro-se for a hearing.
02-25-76	5	Filed Respondent's affdvt in opposition to motion to vacate sentence.
03-18-76	6	Filed OPINION#44090. In light of foregoing, and for other reasons stated in decision of 11/25/74, <u>supra</u> , the application is denied. So Ordered. Gagliardi, J (mn)pro se)
05-20-76	7	Filed petitioner's notice of appeal from order of Judge Gagliardi dismissing his motion to vacate sentence on March 17-76. Pro Se Clerk mailed copies to: Victor Panica at Box PMB, Atlanta, Ga. and U.S. Attorney for the Southern district of New York.
06-16-76	8	Filed NOTICE - RECORD ON APPEAL certificate trans. to USA.

JUDGE

Mark I
tionAnthony J.
11 Fifth Ave
New York, N.Y.

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ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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S.D.N.Y.

-----x
VICTOR PANICA,

Petitioner

- v -

UNITED STATES OF AMERICA,

Respondent.
-----x

75 Civ. 5898

: MEMORANDUM DECISION

44090

This is an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255.

Essentially, the petitioner is attempting to reassert and relitigate issues which have been decided adversely to him by this Court in a previous motion for a new trial and petition for a writ of habeas corpus. United States v. Panica, 72 Cr. 313 (S.D.N.Y., memorandum decision, November 25, 1974, not reported), aff'd without opinion, 516 F. 2d 897.

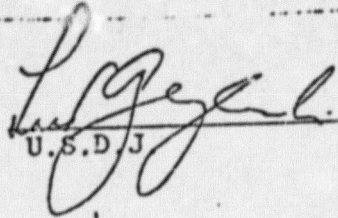
As this Court stated in the November 25, 1974 opinion, affidavits containing hearsay allegations that a co-defendant was coerced to testify or not to testify by the government attorney are insufficient to sustain a habeas corpus application. D'Ercòle v. United States, 361 F. 2d 211, 212 (2d Cir. 1966); United States v. Pisciotta, 199 F. 2d 603, 607 (2d Cir. 1952).

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In light of the foregoing, and for the other reasons stated in the decision of November 25, 1974, supra, the application is denied.

So Ordered.


U.S.D.J.

Dated: New York, New York
March 17, 1976.